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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1030

WILSON J. PARFAIT

versus

JAHNCKE SERVICE, INC.

ROBERT E. RUPPELL, d/b/a
YO-RO DIESEL SERVICE, INC.

THE TRAVELERS INDEMNITY COMPANY

HOME INDEMNITY COMPANY

Petition of The Home Indemnity Company for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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M. N. GROSSEL-ROSSI
of
LEACH, GROSSEL-ROSSI & PAYSSE
Suite 1540, One Shell Square
New Orleans, Louisiana 70139
581-6211
Attorneys for Petitioner,
Home Indemnity Company

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PETITION FOR CERTIORARI

Petitioner, Home Indemnity, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on August 31, 1973.

The opinion of the United States District Court for the Eastern District of Louisiana is reported at 347 F. Supp. 485. The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported. Copies of the opinions and judgments of the District Court and Court of Appeals are attached hereto as Appendix A and Appendix B. A copy of the denial of rehearing with respect to petitioner, Home Indemnity Company, is also attached hereto as part of Appendix B.

The opinion of the United States District Court for the Eastern District of Louisiana was rendered on July 21, 1972. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 31, 1973, with two parties, Robert Ruppell, d/b/a Yo-Ro Diesel Service and the Home Indemnity Company subsequently filing petitions for re-hearing. On October 3, 1973 the petition for re-hearing filed by the Home Indemnity Company was denied. On October 24, 1973 a judgment, with opinion, was rendered on the petition for re-hearing filed by Robert Ruppell d/b/a Yo-Ro Diesel Service, Inc., a copy of which is attached hereto and made part of Appendix B. On November 5, 1973, the Court granted the motion of Home Indemnity Company for stay of the mandate pending application for writs of certiorari from this Court. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

As part of its decision, the Court of Appeal found that the exclusionary language in the policy of insurance issued by Travelers Insurance Company to Robert Ruppell, d/b/a Yo-Ro Diesel Service was sufficiently broad

to exclude coverage for an indemnity suit by a shipowner under the Ryan doctrine of implied warranty. The basis of the exclusion of coverage was that the exclusionary language covered a certain type or class of persons, namely employees, and that any suits arising out of injuries to same were not covered by the Travelers' policy. On the other hand, however, the Court found that the exclusionary language of the Home Indemnity policy issued to the same insured was not sufficiently broad to exclude coverage for a similar indemnity claim, although the language of the exclusion similarly described a particular class of persons for which coverage was not applicable, namely seamen, longshoremen, and any other person subject to the provisions of the Longshoremen and Harbor Workers Compensation Act. The questions presented for review here, as urged by this petitioner, relate to the inconsistency of the interpretation by the Court of Appeal of the two exclusionary provisions, as well as the inconsistency of the decision of the Court of Appeal for the Fifth Circuit with cases previously decided by the United States Court of Appeal for the Ninth Circuit. These questions are:

(1) Whether the interpretation of the Travelers' exclusionary clause, indicating that the key to the exclusion is the status of the person, rather than the procedural route by which the liability comes to rest on the insured, is consistent with the finding of the Court with respect to the exclusionary provision in the Home Indemnity policy, in which the Court stated that it excluded only direct liability to an employee, but not exclusion of a Ryan indemnity claim.

(2) Whether the decision of the Court of Appeal is inconsistent with the cases of Indemnity Insurance Company vs California

Stevedores & Ballast, 307 F.2d 513 (9th Cir. 1962) and Larson Construction Company vs Oregon Automobile Insurance Company, 450 F.2d 1193 (9th Cir. 1971).

STATEMENT OF THE CASE

On or about October 1, 1967, Wilson J. Parfait was employed by Robert E. Ruppell d/b/a Yo-Ro Diesel Service, Inc. as a welder-mechanic. Mr. Parfait was called out by Jahncke Service, Inc. to effect repairs on an engine on its Dredge MANCHAC, which was afloat in the Mississippi River. While waiting for some welding work to cool, Mr. Parfait went to an upper deck to wash his hands and, in returning to the location of the welding work, while still on the upper deck, he slipped and fell, allegedly injuring his back.

Mr. Parfait sued Jahncke Service, Inc. alleging that the Dredge MANCHAC was unseaworthy. Jahncke then third-partied Yo-Ro Diesel Service, Inc. for a breach of the warranty of workmanlike service. Yo-Ro Diesel Service, Inc. in turn filed third-party complaints against the Travelers Indemnity Company and the Home Indemnity Company, alleging insurance coverage under policies issued by the two companies. The Travelers Indemnity Company had issued an Automobile and General Liability policy, while the Home Indemnity Company had issued a Workmens Compensation and Employers Liability Policy, with an exclusion for maritime liability.

The claim of plaintiff was settled by Jahncke Service, Inc. for $74,635.84 prior to the trial. The remaining issues were tried and the District Court found in favor of Jahncke Service and against Yo-Ro Diesel Service, Inc. for breach of the warranty of

workmanlike service owed by Yo-Ro. It also held that the policy issued by the Home Indemnity did not provide coverage due to an exclusion of maritime liability in the policy but held that the policy issued by Travelers Indemnity Company did provide coverage as the work being done was not maintenance of a watercraft and further that the employee exclusion did not apply.

On the appeal of the matter, the United States Court of Appeal for the Fifth Circuit upheld the finding of the trial court for breach of warranty by Yo-Ro in favor of Jahncke, but reversed the District Court on the coverage questions. The Court of Appeal found that the Travelers Indemnity Company policy did not provide coverage, basing its decision on the employee exclusion. The Court of Appeal also reversed the District Court on its decision with respect to the Home Indemnity Company policy, finding that the exclusionary language was not sufficiently broad to exclude coverage for third-party indemnity claims. Petitions for re-hearing were filed by Yo-Ro Diesel Service and Home Indemnity Company, the latter of which was denied. Certain matters concerning costs and attorneys fees were remanded to the District Court by the Court of Appeal for further hearing, as is indicated by their decision of October 24, 1973, a copy of which is attached hereto and made part of Appendix B.

REASONS IN SUPPORT OF WRIT

Petitioner urges this Court to grant its writ of review based on the inconsistency of the interpretation of the Court of Appeal, both within its own decision as well as inconsistency with cases previously decided by the United States Court of Appeal for the

Ninth Circuit. In view of the considerable amount of maritime and insurance litigation and the need for a conformity in interpretation, petitioner urges this Court to grant its writ herein.

I.

While finding that the insuring language of both policies of insurance provide coverage for direct liability as well as Ryan claims, the Court of Appeal inconsistently finds that the employee exclusion of the Travelers policy is sufficient to preclude coverage for the injuries and claims in question, while finding that the maritime exclusion of the Home Indemnity policy, similarly couched in the terms of "injury", is not sufficiently broad to exclude third-party indemnity claims (thereby finding coverage under the latter policy). It is submitted that the Appellate Court has been inconsistent in its construction of the exclusionary language in the two policies and the purposes to be effected by same. For consistency, the Court should have construed the language and the context of the exclusions in similar fashion and thereby obtained a similar result.

Under the Travelers Indemnity policy, exclusion (h) indicates that the insurance does not apply to "bodily injury to any employee of the insured arising out of and in the course of the employment by the insured . . . . ." The Appeal Court construed this wording to mean that it is sufficiently broad to exclude coverage both for direct liability to an injury victim, as well as liability for indemnity under a Ryan situation. The Court of Appeal notes, at page 20 of its opinion:

> "The employee status of the injury victim is made the key to the exclusion, not the procedural route by which the liability comes to rest on the insured." (emphasis added)

The Appeal Court further stated that employee injuries have long been treated as a special kind of risk and covered under special policies. The Court therefore found that the exclusion is sufficient to deny coverage for both direct liability claims as well as indemnity claims under the Ryan doctrine.

In the Home Indemnity policy, the exclusionary endorsement is also in terms of "injury". The language of the Home exclusion indicates that the policy does not apply to any "injury" or "death" to a crewmember or other person subject to the Longshoremen and Harbor Workers Compensation Act. Its scope unequivocally includes any person, whether employee or non-employee, who might be injured aboard a vessel. The exclusion, while couched in the wording of "injury", also sets out, as did the Travelers policy, a certain class of persons or injuries to which the policy is not intended to apply, namely seaman, longshoremen, or other persons who may become subject to the United States Longshoremen and Harbor Workers Compensation Act, i.e. persons who might have claims arising out of the maritime law. The maritime status of the injury victim is the key to the exclusion, not the procedural route by which the liability comes to rest on the insured. Under these circumstances, the term "injury" to a person "subject to the United States Longshoremen and Harbor Workers Compensation Act" should be construed to exclude (similarly to the language of the Travelers policy), coverage to any injury, and the damages sought as a result thereof, whether brought as a direct

claim or through the procedural vehicle of an indemnity action. The plain language of the Home exclusion shows that it does not cover liability arising from or originating in injuries to longshoremen and seamen and the exclusion clause should not be construed so narrowly as to provide coverage by stating that the Ryan indemnity claim arises not directly from the injuries but from breach of a warranty obligation. The indemnity action against Travelers also arises from a breach of a warranty obligation, but there the Appeal Court has chosen to look directly to the injury or status of the person injured rather than the procedural vehicle.

Petitioner submits therefore that the Court has not properly construed the intent and wording of the maritime endorsement exclusion, and that, as in the Travelers policy, the exclusion has a particular purpose: to exclude any type of maritime liability, including both those claims made by direct actions and those made by Ryan indemnity actions (which arise from maritime injuries). If construed in a similar light as the language in the Travelers policy, which exclusion is also in the terms of "injury", then it is clear that the maritime exclusion in the Home policy also excludes coverage in the present instance.

It is submitted therefore that the Court of Appeal for the Fifth Circuit was inconsistent with its interpretation of insurance policy language within its own decision, improperly construing the exclusionary language in the Home Indemnity policy. Considering the large amount of maritime work and insurance coverages in connection therewith, and considering the need for uniformity in interpretation, petitioner submits that this Court

should grant its writ of review.

II.

Consideration by this Court is additionally required in that the holding of the Court of Appeal for the Fifth Circuit conflicts with decisions of the Court of Appeal for the Ninth Circuit in Larson Construction Company vs Oregon Automobile Insurance Company, 450 F. 2d 1193 (9th Cir. 1971) and Indemnity Insurance Company vs California Stevedores and Ballast, 307 F. 2d 513 (9th Cir. 1962). These latter cases, with exclusionary language similar to that in the policy of Travelers Insurance Company herein, were held to exclude coverage only for suits directly by employees against the insured, but were held to provide coverage for third-party indemnity claims. The decision of the Court of Appeal for the Fifth Circuit is apparently in conflict with these decisions and the Court should grant its writ of review to resolve the conflict between the two Circuits.

The particular exclusion in question in the Travelers Insurance policy reads, as follows:

> "This insurance does not apply to:
>
> '(h) Bodily injury to any employee of the insured arising out of and in the course of the employment by the insured; but this exclusion does not apply to liability assumed by the insured under an incidental contract'".

The Court of Appeal for the Fifth Circuit has held that this language precludes coverage for any claims by an employee of the insured, as well as third-party indemnity claims under

the Ryan doctrine arising from injury to an employee. In the Indemnity Insurance Company case, cited supra, the policy was to exclude "bodily injury . . . of any employee of the insured . . .' or . . . any obligation for which the insured . . . may be held liable under any Workmens Compensation law." The Court of Appeal for the Ninth Circuit held that the clause excluding employee bodily injury coverage would be construed as applying only to direct employee claims, and not to third-party indemnity claims, unless application thereof to third-party claims was spelled out in so many words. Similarly, in the Larson decision, the Ninth Circuit held that a policy exclusion of "Bodily injury to an employee" is normally construed as restricted to direct employee claims and does not exclude coverage of third-party indemnity claims unless such exclusion is spelled out.

With respect to the Travelers policy exclusion, it states that the insurance does not apply to bodily injury to an employee of the insured arising out of and in the course of the employment by the insured; it makes no specific reference to third-party indemnity claims. Yet the Court of Appeal for the Fifth Circuit has, in the present instance, found that this language is sufficient to preclude coverage for even third-party indemnity type claims. In the Larson and Indemnity Insurance decisions, supra, the Court has indicated that similar exclusionary language concerning application of the policy to employee injuries would only exclude direct employee claims, and not third-party indemnity claims, unless application of the exclusion to third-party claims was clearly spelled out in the policy. The decision of the Court of Appeal for the Fifth Circuit is therefore in conflict with the holdings of the Court of Appeal for the Ninth Circuit and

resolution of this conflict is required.

It is respectfully submitted that this Honorable Court should grant its writ of review to resolve the conflicting decisions of the two Circuits and provide uniformity in the interpretation of similar policy provisions.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeal for the Fifth Circuit is erroneous and disturbs the rule of uniformity desired for the various Courts of Appeal. The decision is both inconsistent within itself, as well as being inconsistent and contradictory to prior decisions of the United States Court of Appeal for the Ninth Circuit. Important considerations of maritime law and the insurance applicable to the various types of claims made thereunder are represented here and a writ of review is required by this Court to resolve same. It is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted

M. N. GROSSEL-ROSSI
of
LEACH, GROSSEL-ROSSI & PAYSSE
Suite 1540, One Shell Square
New Orleans, Louisiana 70139
581-6211
Attorneys for Petitioner,
Home Indemnity Company

CERTIFICATE

I hereby certify that a copy of the foregoing has been forwarded through the United States mail, postage prepaid, this 3rd day of December, 1973, to counsel of record listed below.

M. N. GROSSEL-ROSSI

Counsel of record:

CHRISTOPHER TOMPKINS
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, Louisiana 70139

WALTER F. GEMEINHARDT
1328 First National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

JOHN R. PETERS, JR.
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE
225 Baronne Street - 28th Floor
New Orleans, Louisiana 70112

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILSON J. PARFAIT	CIVIL ACTION
VS.	NO. 69-225
JAHNCKE SERVICE, INC.	SECTION "I"

CONCLUSIONS OF LAW
AND
FINDINGS OF FACT

William J. Daly, New Orleans, Louisiana
and
Samuel C. Gainsburgh, Kierr, Gainsburgh & Benjamin, New Orleans, Louisiana

for plaintiff

Christopher Tompkins and Leonard N. Bouzon, Deutsch, Kerrigan & Stiles, New Orleans, Louisiana

for defendant, Jahncke Service, Inc.

Walter F. Gemeinhardt, New Orleans, Louisiana

for third-party defendant, Yo-Ro Diesel Service, Inc.

John R. Peters, Jr. and Herschel E. Richard, Jr., Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, Louisiana

for third-party defendant, Travelers Indemnity Company

M. N. Grossel-Rossi and Michael A. Britt,
Leach, Grossel-Rossi & Paysse,
New Orleans, Louisiana

for third-party defendant
Home Indemnity Company

GORDON, District Judge:

On or about October 1, 1967, Wilson J. Parfair, a welder employed by Yo-Ro Diesel Service, Inc., was repairing a broken cylinder block on a diesel engine aboard the Diesel Dredge Manchac (hereinafter "The Manchac"), which was owned and operated by Jahncke Service, Inc. While he was working on the engine, Parfair slipped on the floor of the engine room causing serious injury to his back and neck.

As a result of this accident Parfait brought the instant action against Jahncke Service, Inc. (hereinafter referred to as "Jahncke"), based on the alleged unseaworthiness of The Manchac and the alleged negligence of Jahncke. Jahncke then filed a third party complaint against Parfait's employer, Yo-Ro Diesel Service, Inc. (hereinafter referred to as "Yo-Ro") seeking indemnification from Yo-Ro for any liability to Parfait that Jahncke might incur. Jahncke based its claim for indemnification from Yo-Ro on the theory that Yo-Ro had breached its implied warranty of workmanlike performance. Both Jahncke and Yo-Ro then filed third party demands against Yo-Ro's two insurers, Travelers Indemnity Company (hereinafter referred to as "Travelers") and Home Indemnity Company (hereinafter referred to as "Home"). The two insurance companies were made third parties so that any possible indemnification Yo-Ro owed to Jahncke would be covered by either or both insurance policies. Both insurance companies,

however, contend that there is no coverage under their policies.

Prior to the trial of this matter the main action between Wilson Parfait and Jahncke was compromised, and trial only as to the third party actions was conducted before this Court. At the conclusion of the trial the parties were required to submit additional memoranda on the issues before the Court, which are: (i) is Jahncke entitled to indemnification from Yo-Ro, (ii) is coverage provided for Yo-Ro's liability to Jahncke by Travelers' policy, (iii) is coverage provided for Yo-Ro's liability to Jahncke by Home's policy, and (iv) is the settlement between Parfait and Jahncke reasonable. The Court has decided the foregoing issues after consideration of the testimony and evidence presented at the trial, and the memoranda submitted by the parties.

Indemnification

Upon discovering that the main pump engine aboard The Manchac was broken, Jahncke contracted with Yo-Ro to weld the broken part. Parfait, the working foremen for Yo-Ro, came aboard the vessel to inspect the broken pump engine and determine what equipment should be used to make the repair. After completing his inspection Parfait left the vessel to obtain the tools and equipment needed for performance of the repair job. About two hours later Parfait returned with his son, Wilson J. Parfait, Jr., who was employed by Yo-Ro as an apprentice welder and was to assist his father in the welding job. While Parfait was gone Jahncke's employees had dismantled part of the engine to enable Parfait to perform his repair work, and, in so doing, the Jahncke employees disconnected a fuel line from which fuel oil was allowed to drip and accumulate

on a catwalk adjacent to the engine, creating a dangerous condition. The Jahncke employees were not aware that fuel oil had dripped and created a hazard. Parfait, while standing on the catwalk to work on the engine, noticed that fuel oil was dripping and that it had accumulated on the floor where he was working; however, he neither attempted to remove the oil nor did he request Jahncke's employees to clean it up.

After working for approximately two hours on the repair, Parfait reached a point where the weld had to cool before he could continue. He walked to the end of the catwalk and up a short ladder to the deck above and proceeded straight to a wash stand a short distance away. After washing his hands he returned, in the same direction from which he had come, and headed for the ladder leading down to the catwalk. As he neared the ladder he slipped and fell, either as a result of fuel oil on the soles of his shoes that had been picked up while he worked on the catwalk where fuel oil had accumulated, or as a result of fuel oil tracked on the steel deck by his shoes when he walked toward the wash stand.

Jahncke employees were cleaning engine parts in cans of fuel oil on the deck where the wash stand was located at the time Parfait walked to and from the wash stand. This activity, however, was well away from Parfait's path between the ladder and the wash stand and did not in any way contribute to the accident.

The accumulated fuel oil on the catwalk of The Manchac was a hazardous condition which rendered the vessel unseaworthy, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960), and that

unseaworthiness was a proximate cause of the accident.

Yo-Ro, as a contractor aboard Jahncke's vessel, The Manchac, owed Jahncke, as owner of the vessel, a warranty of workmanlike performance. Whisenant v. Brewster-Bartle Offshore Company, 446 F.2d 394 (5th Cir. 1971).

The warranty of workmanlike performance was breached by Yo-Ro when it failed either to clean up the accumulated oil on the catwalk before its crew began working or to inform Jahncke personnel that its crew would not commence working until the accumulated oil was cleaned up. The Fifth Circuit in Burrage v. Flota Mercante Grancolombiana, 431 F.2d 1229 (5th Cir. 1970) stated:

> The notion of workmanlike performance certainly encompasses an obligation by the contractor to take notice of those deficiencies and hazards likely to give rise to damage to life, limb, or property and then take requisite action depending on the nature of the relationship of the parties and their contractual obligations, express or implied, either to eliminate or minimize the hazard or to stop work until the situation is corrected. 431 F.2d at 1232.

In Burrage, supra, the court found that a stevedore had breached its warranty of workmanlike performance when its longshoremen who were assisting in the unloading of a ship noticed beans spilled on the wharf. The longshoremen knew this condition was unsafe, and yet they did nothing about it. Furthermore, the Court said that the spillage did not have to be excessive. The condition had rendered

the vessel unseaworthy, and this was sufficient to compel a conclusion that workmanlike performance called for a stevedore to do something.

This Court must conclude that the Fifth Circuit's rationale and holding in Burrage, supra, is controlling. Yo-Ro breached its warranty of workmanlike performance when its working foreman, Wilson Parfait, after noticing the unseaworthy condition, the accumulated fuel oil on the catwalk, failed either to clean up the oil or to discontinue his repair work until it was removed by Jahncke's employees.

Yo-Ro argues that Jahncke's action for indemnification is precluded by certain conduct on its part; namely, the disconnection of the fuel line from which the fuel oil dripped. In Weyerhaeuser Steamship Co. v. Nacirema Operating Company, Inc., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958), the Supreme Court indicated that conduct on the part of the shipowner could preclude contractual indemnification. The Fifth Circuit in Waterman Steamship Corp. v. David, 353 F.2d 660 (5th Cir. 1965), stated that contract principles are to be applied by the trier of fact to determine what conduct on the part of the shipowner will preclude indemnity.

In the instant case, although the unseaworthy condition was caused by Jahncke, Yo-Ro did nothing to remedy the hazardous condition that it noticed was present. A similar situation was present in T. Smith & Son, Inc. v. Shibs A/S Hassel, 362 F.2d 745 (5th Cir.1966), wherein the court held that negligence of the shipowner did not preclude indemnification. The stevedore's employee was aware of the condition and did nothing to correct it. The Fifth Circuit in Southern Stevedoring &

Contract Co. v. Hellenic Lines, Ltd., 388 F.2d 267, 272 (5th Cir. 1968), stated:

> [Shipowner's] conduct, to preclude indemnity, must be sufficient to bar the enforcement of the contract. The vessel's unseaworthiness, although a proximate cause of the accident, is not in itself conduct necessarily sufficient to preclude recovery. Without entering the thicket of primary and secondary, or active and passive negligence . . . the trier of fact must weigh the substantiality of the fault of the shipowner against the breach of warranty by the stevedore to determine whether the former's conduct is "sufficient to preclude indemnity." (citations omitted).

This Court, after weighing the substantiality of the fault of Jahncke against the breach of warranty by Yo-Ro, is of the opinion, under all of the circumstances, that any fault by Jahncke and unseaworthiness created thereby, would not have prevented Yo-Ro from performing its operations in a workmanlike manner. Accordingly, it is held that Jahncke is entitled to indemnification from Yo-Ro.

The Travelers Indemnity Company Policy

At the time of Parfait's accident a Commercial Automobile - General Liability Policy (hereinafter referred to as the "Travelers policy") numbered KDS-6741447 was in effect between the insured, Yo-Ro, and Travelers. Yo-Ro argues that the policy provides coverage for the indemnification sought by Jahncke. Travelers argues that either Exclusion (d) or Exclusion (h) of the Manufacturers' and

Contractors' Liability Insurance Coverage part of the Travelers policy vitiates any coverage.

Whether either or both of these exclusions relieve Travelers of coverage is a close and difficult question. Hence, the Court will not only state its decision, but will delineat in some detail the novel issues which are involved in interpreting the Travelers policy.

Exclusion (d) of the Travelers policy is generally referred to as the watercraft exclusion. It provides, in part:

> This insurance does not apply:
>
> * * * * * *
>
> (d) To bodily injury . . . arising out of the ownership, maintenance, operation, use, loading or unloading of any watercraft, if the bodily injury . . . occurs away from premises owned by, rented to or controlled by the named insured; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

It is conceded by the parties that the accident occurred away from premises owned by, rented to or controlled by Yo-Ro and that liability was not assumed by Yo-Ro under an incidental contract; however, the parties contest whether Yo-Ro was performing maintenance within the meaning of the term's use in the watercraft exclusion at the time of Parfait's injury.

It is left to the finder of fact to deter mine whether the activity that Yo-Ro was

engaged aboard The Manchac was maintenance, and the Court finds that Yo-Ro, through its employees, was engaged in the repair of the main pump engine aboard The Manchac. This activity, however, did not constitute maintenance as the term is utilized in Exclusion (d) of the Travelers policy, but rather, the activity by Yo-Ro was in the form of simple repair work.

The leading case interpreting a watercraft exclusion is Grigsby v. Coastal Marine Service of Texas, Inc., 412 F.2d 1011 (5th Cir. 1969). In that case the Fifth Circuit considered a watercraft exclusion similar to the one contained in the Travelers policy and stated:

> [T]he policy is intended to exclude coverage when use or maintenance, loading or unloading of the vessel is that of the assured, and as between Underwriter and Assured, that depends on whose work was being done, what work was being done, and that adds up to the permissible conclusion of the Trial Judge that this was not here "maintenance of the barge by Welders." 412 F.2d at 1038.

Grigsby presented a factual situation in which a company known as "Coastal Marine" contracted with another company, "Welders," the insured, to supply a pump for the removal of water from the tanks of a barge which was being serviced by Coastal Marine. Coastal Marine was unsuccessful in its attempt to start the pump. A Welders employee came aboard the barge with two additional pumps and worked for approximately one hour until the accident happened.

Welders' insurer asserted that its policy did not provide any coverage for liability to Welders because of the watercraft exclusion contained therein. The court was compelled to find that Welders' employee at the time of the accident was engaged in ship repair work because of certain federal safety regulations. This finding on the part of the court, the insurer argued, also required the court to find that Welders was engaged in the "ownership, maintenance, operation, use, loading or unloading of" a vessel for which activity there was no coverage by virtue of the watercraft exclusion. In response the court stated:

> Many factors point in the other direction. While it is true that we have held that the work being done by Sonnier [Welders' employee] had the force of making his employer for that operation into one engaged in ship repairing so far as coverage of that Federal Act was concerned, this is a long way from holding that Welders was in fact or in law engaged in "maintenance" of the Barge. The "maintenance" was being performed by Coastal, and Welders' role was to supply the needed pumps. Additionally, if the literal reading were applied, it would exclude liability for damage to the vessel simply because of its status as one then undergoing "maintenance, operation, use, loading or unloading." 412 F.2d at 1037.

Yo-Ro argues that its activity aboard The Manchac was analogous to the activity of Welders in Griggsby. While this is a very close question, and although there are distinctions

between the role of Welders in Grigsby and the role of Yo-Ro in the instant case, this Court finds that the role of Yo-Ro here is closer to that of Welders than that of any of the other parties in Grigsby. It is true, for example, that in Grigsby Welders was found to be engaged in ship repair work because its activity came within the ambit of certain federal safety regulations. This Court feels, however, that even absent the federal safety regulations, had the court in Grigsby made the factual determination that Welders was engaged in ship repair work, the court would not have concluded that such isolated activity as that engaged in by Welders constituted "maintenance" as that term is used in the watercraft exclusion. Rather, this Court interprets Grigsby as requiring a finding of continuous or regular repair activity as a prerequisite to "maintenance" within the definition of the exclusion. The Fifth Circuit did, in fact, conclude that the continuous and regular activity of Coastal Marine in Grigsby constituted "maintenance."

In the instant case, the testimony of Willie Gordon, the Chief Engineer on The Manchac, establishes beyond doubt that the normal upkeep, repair and maintenance of The Manchac and its engine was performed by Jahncke personnel. Yo-Ro was called upon only when a repair required welding or turning the engine's crankshaft. Mr. Gordon could recall only three occasions when Yo-Ro had performed work on The Manchac. According to these facts, the activity of Yo-Ro here fits somewhere in between that of Coastal Marine and that of Welders in Grigsby, but this Court feels that it is more analogous to that of Welders. In Grigsby Coastal Marine had a specific contract with Aiple Towing, the owner of the barge in Grigsby, to service all of Aiple's barges calling

at the Olin Terminal. Yo-Ro had no written contract with Jahncke to perform any services whatsoever. Jahncke chose to perform its own maintenance of The Manchac. Yo-Ro only performed certain specialized repair work when requested to do so by Jahncke.

In reaching its conclusion that the activity of Yo-Ro was not maintenance under Exclusion (d) of the policy, this Court also had relied upon the doctrine of noscitur a sociis a concept which requires that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it. First National Bank & Trust Co. v. Lincoln Power Corp., 118 F.Supp. 340 (E.D. Okla. 1953). See also, Jarecki v. G. D. Searle & Co., 367 U.S. 303, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961); Polaroid Corp. v. C.I.R., 278 F. 2d 148 (1st Cir. 1960); Wong Kam Wo v. Dulles 236 F.2d 622 (9th Cir. 1956); Geer v. Birmingham, 88 F.Supp. 189 (N.D. Iowa 1950). Generally the courts have used noscitur a sociis in the area of statutory construction, but the concept is equally applicable in the area of insurance contract construction. 1 Couch on Insurance §15.70 (2d ed. 1959).

The words in Exclusion (d) which surroun and are associated with the term "maintenance are "ownership," "operation" and "use." Each of these words has a meaning that connotes a form of continuous activity. Thus, noscitur a sociis requires that "maintenance" should be interpreted in a similar manner, and, so interpreted, "maintenance" as used in Exclusion (d) means a more continuous activity than that engaged in by Yo-Ro.

As has been discussed, the Court has had difficulty in interpreting the watercraft exclusion of the Travelers policy. Just as the watercraft exclusion in Grigsby is "not

altogether free from doubt," the watercraft exclusion in the Travelers policy is not altogether free of doubt. "There is some ambiguity. There is a need for construction. At this late date, it is an affectation to cite cases as to what occurs in that situation with an insurance policy." 412 F.2d at 1037.

For the foregoing reasons, the Court concludes that Yo-Ro was not performing maintenance as contemplated by Exclusion (d) of the Travelers policy, and thus, Exclusion (d) does not relieve Travelers from coverage under its policy.

Travelers also denies coverage because of Exclusion (h) in the policy which states:

> This insurance does not apply:
>
> * * * * * *
>
> (h) to bodily injury to any employee of the insured arising out of and in the course of his employment by the insured; but this exclusion does not apply to liability assumed by the insured under an incidental contract;

It is conceded by the parties that Parfait was an employee of Yo-Ro, that his injury was sustained while in the course of his employment, and that the contract between Yo-Ro and Jahncke was not an "incidental contract," as defined in the policy. Yo-Ro, however, argues that any liability that it has to Jahncke is contractual, and that Exclusion (h) operates only when an employee of Yo-Ro is suing Yo-Ro directly. Moreover, Yo-Ro urges that certain language in Exclusion (a) in the policy is intended to retain coverage for any liability Yo-Ro has to Jahncke that arises out

of a breach of Yo-Ro's warranty of workmanlike performance which was owed to Jahncke. Exclusion (a) states that:

> This insurance does not apply:
>
> (a) to liability assumed by the insured under any contract or agreement except on incidental contract; but with respect to bodily injury or property damage occurring while work performed by the named insured is in progress, this exclusion does not apply to a warranty that such work will be done in a workmanlike manner.

Travelers, admitting that Exclusion (a) provides coverage for liability of Yo-Ro where Yo-Ro has breached its warranty of workmanlik performance resulting in a suit for indemnification under Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corporation, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), as has been brought against Yo-Ro by Jahncke in this case, argues that the coverage for damages arising out of bodily injury retained in Exclusion (a) is restricted by Exclusion (h) to bodily injury to persons other than employees of Yo-Ro.

In support of its contention Yo-Ro cites Indemnity Insurance Company of North America v. California Stevedore & Ballast Company, et al, 307 F.2d 513 (9th Cir. 1962) wherein the Ninth Circuit considered the insurer's contention that its policy did not provide coverage where an employee of a stevedore sued a shipowner and the shipowner subsequently soug indemnification from the stevedore. The poli there in question contained an Exclusion (c) which stated:

Exclusion (c)

> This policy does not apply under coverage A, except with respect to liability assumed under written contract, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured, other than a domestic employee for whose injury benefits are not payable or required to be provided under any workmen's compensation law; or to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law; *** (emphasis added)

The court there found there was coverage notwithstanding such exclusion. First, it held that Exclusion (c) was generally inapplicable since it related to workmen's compensation or employer's liability, or both, neither of which was dealt with by the shipowner's case at bar. With regard to the issue pertinent to this case, the court simply stated, "We do not read Exclusion (c) as excluding anything having to do with appellees' [the stevedores'] contractual liability." 307 F. 2d at 516. The court then concluded that even if Exclusion (c) were generally applicable, the insurance coverage still would exist since, as the court determined, the stevedores' liability to the shipowners had been assumed under written contracts.[1]

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[1] Exclusion (h) of the Travelers policy with Yo-Ro in the instant case states that the policy applies to "liability assumed by the insured under an incidental contract,"

(continued on next page)

In the recent case of Larson Constructio Co. v. Oregon Automobile Insurance Co., 450 F.2d 1193 (9th Cir. 1971), the Ninth Circuit considered in some detail the applicability o an exclusion from bodily injury coverage of bodily injury to an employee in the context of a comprehensive general liability policy, and amplified on its rationale of Indemnity Insurance, supra. The Larson case involved a situation where a barge loader's employee, injured while assisting in the loading of a barge, sued the barge owner, who claimed indemnification from the employer. Under its comprehensive general liability policy the employer's insurer was obligated "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of *** BODILY INJURY," 450 F.2d at 1194. The policy in Exclusion (c), however, excluded coverage for "(c) *** bodily injury of an employee of an insured arising out of and in the course of *** (2) *** employment by an insured ***", 450 F.2d at 1194. The insurer denied liability on the basis of this exclusion. The court, however, stated:

> We turn to exclusion (c). The word in the insuring clause, "*** all sums which insured shall become legally obligated to pay as damages because

---

1 (Cont.)
whereas the exclusion in Indemnity Insurance, supra, refers to "liability assumed under a written contract." The parties ar in agreement that the contract of repair between Yo-Ro and Jahncke was not an "incidental contract" as defined by the policy.

of *** BODILY INJURY ***", standing alone, and without reference to the exclusions, is broad enough to cover first, the liability to an employee because of injuries suffered by him and second, the liability to a third person which has its origin in bodily injuries suffered by the employee. The problem here arises because the exclusion does not refer to "*** all sums which the insured shall become legally liable to pay as damages because of *** BODILY INJURY LIABILITY," but simply makes the coverage inapplicable to "*** bodily injury to any employee. ***" As we see it, the language of the exclusion is somewhat narrower than the language of the insuring clause and while the meaning is not clear, the exclusion could be interpreted to refer to no more than the damages suffered by the employee himself. Because of workman's compensation and similar laws, the employee presents a special kind of risk ordinarily insured by a special policy devoted exclusively to that risk or in some cases by deposits ordered by the officers administering the workman's compensation or similar law. A person examining exclusion (c) might reasonably believe that it was intended to exclude only that special employee hazard normally covered by that special policy. In view of the special treatment of the employee hazard, the differences between the words used in the insuring and the exclusion clauses and the fact that the risk here was a known risk, we hold that the exclusion (c) was not spelled out in sufficient certainty

> to eliminate the coverage in this case.
>
> The result which we reach is in accord with, although not compelled by, the decision in Indemnity Ins. Co. v. California Stevedore & Ballast Co., 307 F.2d 513 (9th Cir. 1962). In that case the Court relied upon the existence of a contract between the stevedore and shipowner and a clause in the policy assuming liability under written contracts. There is no contract here. Notwithstanding, we hold that if the liability of the stevedore to the shipowner is not to be insured in a comprehensive liability policy then that risk should be excluded in unmistakable terms no matter what words may be used to rationalize the imposition of the stevedore's liability. 450 F.2d at 1195-96 (Emphasis supplied).

There is some difference in the Travelers policy before this Court and the policy in the Larsen case which might arguably be used to distinguish Larsen. The policy in Larsen, supra, was a Comprehensive General Liability Policy whereas the instant Travelers policy is entitled Manufacturers' and Contractors' Liability Insurance. The wording of the general obligation of the insurer and Exclusion (h) in the instant policy are somewhat different from the wording employed in the policy in Larsen, supra.

The opinion in Larsen, supra, did not reproduce the policy in question in its entirety; therefore, it cannot be determined whether the policy in the Larsen case may have

ad an exclusion similar to Exclusion (a) in he instant policy. Nevertheless, the pre- ence of Exclusion (a) in Yo-Ro's insurance olicy with Travelers reinforces the position hat the Travelers policy provides coverage or Yo-Ro's liability to Jahncke.

It might be argued that a finding that he language of Exclusion (a) retaining cover- ge for liability arising out of breaches of arranty of workmanlike performance does pro- ide coverate for Yo-Ro's liability would ren- er Exclusion (h) in part meaningless. This ourt is mindful that in considering an in- urance policy it should interpret the policy o that all provisions of the policy are iven a reasonable meaning and no portion is eft inexplicable or useless. Jameson v. utual Life Insurance Company of New York, 15 F.2d 1017, 1020 (5th Cir. 1969). The ourt is equally mindful, however, that where here is ambiguity in a policy of insurance, uch ambiguity must be construed in favor of he insured. Grigsby, supra, at 1037.

The conclusion, therefore, is inescap- ble that the Travelers policy does provide overage for Yo-Ro's liability to Jahncke hich resulted from Yo-Ro's breach of its arranty of workmanlike performance. Such a onclusion does not render Exclusion (h) eaningless, rather, Exclusion (h) would oper- ge to deny coverage to Yo-Ro for any liability t might have toward insured employees who are ot covered by compensation or similar statute.[1]

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[1] The Ninth Circuit in Larsen, supra, indicated that it was reasonable to assume that the ex- clusion before that court was intended to deny coverage for any liability the employer might

(continued on next page)

The exception in Exclusion (a) is clearly intended to provide coverage where Yo-Ro's liability arises as a result of a breach of its warranty of workmanlike performance. If Travelers intended to limit this coverage to bodily injury to persons other than employees of Yo-Ro, then it did not do so with sufficient clarity.

Home Indemnity Company Policy

Home's policy is a workmen's compensation and employer's liability policy. The policy is intended to provide Yo-Ro with coverage when there is a compensation claim or when an employee has a claim that is not covered by a compensation Act. The policy covered claims under the Louisiana Workmen's Compensation and the Longshoremen and Harbor Workers Act. There was also $25,000 coverage under Employer's Liability.

The only maritime liability covered by the policy is under the Longshoremen and Harbor Workers Act; all other maritime liability is excluded by the following endorsement:

> It is agreed that the policy does not apply to injury, including death resulting therefrom, sustained by a master or a member of the crew of any vessel or by any person in the course of an employment subject to

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1 (Cont.)
have under a workmen's compensation statute. The instant Travelers policy, however, contains a specific exclusion [Exclusion (g)] dealing with liability under workmen's compensation statutes.

> the United States Longshoremen's and Harbor Workers' Compensation Act.

Wilson Parfait was injured while repairing a vessel on navigable waters, and is, thus, subject to the provisions of the Longshoremen and Harbor Workers Act. Calbeck v. Travelers Ins. Co., 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962). The policy provides coverage for a claim under the Longshoremen and Harbor Workers Act, but that is the limit of the policy's coverage for maritime injuries.

In Brickley v. Offshore Shipyard, Inc., 270 F.Supp. 985 (E.D. La. 1967), the plaintiff was seeking recovery as a seaman or in the alternative, as a longshoreman. The defendant's insurance policy contained an exclusion which stated:

> It is agreed that the policy does not apply to injury; including death resulting therefrom, sustained by:
> (1) a master or a member of the crew of any vessel . . . .
> 270 F.Supp. 987.

The Court stated:

> If the plaintiff here were a seaman, as he alleges in his complaint, we would feel bound to grant the motion for summary judgment for lack of coverage, since the very definition of seaman is "a member of the crew of any vessel." 270 F. Supp. at 987.

In Home's policy the exclusion of maritime liability has been extended to injuries sustained by persons subject to the Longshoremen and Harbor Workers Act, and therefore,

the Court must conclude that the policy does not provide coverage for Yo-Ro's liability to Jahncke arising out of the accident of the plaintiff Parfait.

Reasonableness of the Settlement

The Court concludes that the settlement between Wilson Parfait and Jahncke was reasonable. Yo-Ro argues that it should not be required to accept the settlement because it did not participate in the settlement negotiations between Parfait and Jahncke. There is no merit to Yo-Ro's contention inasmuch as it was apprised of the progress of settlement negotiations (Jahncke's Exhibit 4) and felt that the negotiations were favorable to Yo-Ro (Jahncke's Exhibit 3). Parfait was suing Jahncke, and it was Jahncke's responsibility to seek settlement. A shipowner may settle the main demand with the injured longshoreman or harbor Worker and proceed against the employer where the stevedore's acts caused the accident. Paliage v. Luckenbach Steamship Company, 301 F.2d 403 (2nd Cir. 1962), and American Export Lines v. Norfolk Shipbuilding & Drydock Corporation, 336 F.2d 525 (4th Cir. 1964). In the cited cases there is no requirement that a shipowner include the employer in the settlement negotiations.

Travelers asserts that a finding by the Court of the cause of the accident is determinative of the reasonableness of the settlement. Travelers contends that if Parfait's injury resulted solely from oil on his shoes, then the settlement was unreasonable because Parfait was solely responsible for his injury; however, if the spillage of oil by Jahncke employees cleaning engine parts on the upper deck caused Parfait's accident, then the

settlement was reasonable because Jahncke was responsible for the accident.

The test of the reasonableness of the settlement is the potential liability of the shipowner. In California Stevedore & Ballast Co. v. Pan-Atlantic Steamship Corporation, 291 F.2d 252 (9th Cir. 1961), the Ninth Circuit refused to accept the stevedore's argument that the liability of the shipowner must be proved to have been an actual one. Rather, the court stated:

> [T]he indemnitee need show only a potential liability; the indemnitee need not resist settlement to the point of a jury verdict, the amount of which might greatly exceed a reasonable settlement. 291 F.2d at 254.

See also, Damanti v. A/S Inger, 314 F.2d 395, 397 (2nd Cir. 1963). Jahncke has shown that it faced a serious potential liability. Under either theory as to the source of the oil which caused Parfait to slip, Jahncke would face a serious potential liability from a claim of unseaworthiness by Parfait.

The only question remaining is the reasonableness of the amount of the settlement. The suit was for $160,000 with evidence that Parfait had suffered a permanent disability as to heavy work, lost wages of $30,000, anticipated lost wages of $130,000, and two operations for the removal of ruptured disc material. Even assuming substantial contributory negligence on the part of Parfait, the settlement in the amount of $74,635.84 was reasonable.

Accordingly, IT IS ORDERED that there be

judgment in favor of Jahncke Service, Inc. in the amount of $74,635.84 against Yo-Ro Diesel Service, Inc. on the third party demand for indemnification.

IT IS FURTHER ORDERED that there be judgment in favor of Yo-Ro Diesel Service, Inc. and against Travelers Indemnity Company on the third party demand seeking to establish coverage for Yo-Ro Diesel Service, Inc.'s liability to Jahncke Service, Inc.

IT IS FURTHER ORDERED that there be judgment in favor of Home Indemnity Company and against Yo-Ro Diesel Service, Inc. on the third party demand seeking to establish coverage for Yo-Ro Diesel Service, Inc.'s liability to Jahncke Service, Inc.

Thus done and signed at New Orleans, Louisiana, this 21st day of July, 1972.

s/Jack M. Gordon
United States District Judge

UNITED STATES DISTRICT COURT	: CIVIL ACTION
EASTERN DISTRICT OF LOUISIANA	: NO. 69-225
	: SECTION I
	: Filed 10-12-72

WILSON J. PARFAIT

versus

JAHNCKE SERVICE, INC.

AMENDED JUDGMENT

This action having come on for trial before the Court, on a former day, Honorable Jack M. Gordon, District Judge, presiding, and the issues having been duly tried, and Findings of Fact and Conclusions of Law having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Jahncke Service, Inc. and against third-party defendant, Robert E. Ruppel d/b/a Yo-Ro Diesel Service and Yo-Ro Diesel Service, Inc., on Jahncke's third-party demand for indemnification, in the amount of Seventy Four Thousand Six Hundred Thirty Five and 84/100 ($74,635.84) Dollars, in addition to its expenses and costs of defense, including a reasonable attorney's fee, with legal interest thereon at the rate of seven percent (7%) per annum as provided by law, from the date

of the filing of the original Judgment in this action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment over, in the same amount and for the same items of recovery, in favor of Robert E. Ruppel d/b/a Yo-Ro Diesel Service, and against fourth-party defendant, The Travelers Indemnity Company on Yo-Ro's fourth-party demand for insurance coverage under Travelers' policy, in addition to its expenses and costs of defense, including a reasonable attorney's fee, with legal interest thereon at the rate of seven percent (7%) per annum as provided by law, from the date of the filing of the original Judgment in this action;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Home Indemnity Company and against Robert E. Ruppel d/b/a Yo-Ro Diesel Service, and Yo-Ro Diesel Service, Inc., on Yo-Ro's fourth-party demand seeking to establish insurance coverage under Home's policy;

IT IS FURTHER ORDERED that if the parties do not agree, within sixty (60)days of the date of filing of the original Judgment, on the amounts of expenses and costs of defense including reasonable attorneys' fees, as awarded herein, any party may, upon written motion, apply to the Court for a hearing to determine those amounts.

New Orleans, Louisiana, this 12 day of September, 1972.

s/Jack M. Gordon
UNITED STATES DISTRICT JUDGE

SUBMITTED BY:

s/Christopher Tompkins
CHRISTOPHER TOMPKINS
and
LEONARD N. BOUZON
of
DEUTSCH, KERRIGAN & STILES
1700 Hibernia Bank Building
New Orleans, Louisiana 70112
Telephone: 524-1221
Attorneys for Jahncke Service, Inc.

NO OBJECTION AND APPROVED AS TO FORM:

s/Walter F. Gemeinhardt
WALTER F. GEMEINHARDT
1328 National Bank of Commerce Building
New Orleans, Louisiana 70112
Attorneys for Robert E. Ruppel d/b/a
Yo-Ro Diesel Service and
Yo-Ro Diesel Service, Inc.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3316

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,
Defendant-Third Party
Plaintiff-Appellee,

YO-RO DIESEL SERVICE, INC.,
Third Party Defendant-
Fourth Party Plaintiff-
Appellee-Appellant,

HOME INDEMNITY COMPANY,
Third Party Defendant-Appellee,

THE TRAVELERS INDEMNITY COMPANY,
Fourth Party Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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(August 31, 1973)

APPENDIX B

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

THORNBERRY, Circuit Judge: In this multiparty admiralty case we must determine whether the district court properly awarded a shipowner indemnity under the *Ryan* doctrine for amounts it paid in settlement of a claim against it and whether the district court correctly interpreted two insurance policies.

On October 1, 1967, Wilson Parfait, an employee of Yo-Ro Diesel Service, Inc., was injured while he was aboard a diesel dredge owned and operated by Jahncke Service, Inc. to repair a broken cylinder block of one of the vessel's engines. Parfait sued Jahncke to recover for his injuries, alleging negligence and unseaworthiness. Jahncke filed a third-party complaint against Yo-Ro for indemnity under the *Ryan*[1] doctrine. Jahncke and Yo-Ro both filed fourth-party actions against Yo-Ro's two insurers, Travelers Indemnity Company and Home Indemnity Company. Jahncke settled the original suit brought by Parfait, and the third- and fourth-party suits were tried to the Court. The district court awarded Jahncke indemnity from Yo-Ro, and held Yo-Ro's loss to be covered by the Travelers policy, but not by the Home policy. Travelers and Yo-Ro appeal, testing the strength of all links by which they are connected to the liability chain. Additionally, Yo-Ro seeks to forge a new protective link, arguing that the Home insurance policy, as well as the Travel-

[1]Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, 1956, 350 U.S. 122, 76 S.Ct. 232.

ers policy, should be construed to cover any loss which Yo-Ro may eventually suffer as a result of Parfait's injury. We affirm the district court's ruling that Jahncke is entitled to indemnity from Yo-Ro but reverse as to coverage under each insurance policy.

The district court summarized the facts relating to Parfait's injuries as follows:

> Upon discovering that the main pump engine aboard The Manchac was broken, Jahncke contracted with Yo-Ro to weld the broken part. Parfait, the working foreman for Yo-Ro, came aboard the vessel to inspect the broken pump engine and determine what equipment should be used to make the repair. After completing his inspection, Parfait left the vessel to obtain the tools and equipment needed for performance of the repair job. About two hours later Parfait returned with his son, Wilson J. Parfait, Jr., who was employed by Yo-Ro as an apprentice welder and was to assist his father in the welding job. While Parfait was gone, Jahncke's employees had dismantled part of the engine to enable Parfait to perform his repair work, and, in doing so, the Jahncke employees disconnected a fuel line from which fuel oil was allowed to drip and accumulate on the catwalk adjacent to the engine, creating a dangerous condition. The Jahncke employees were not aware that fuel oil had dripped and created a hazard. Parfait, while standing on the catwalk to work on the engine, noticed that fuel oil was dripping and that it had ac-

cumulated on the floor where he was working; however, he neither attempted to remove the oil nor did he request Jahncke's employees to clean it up.

After working for approximately two hours on the repair, Parfait reached a point where the weld had to cool before he could continue. He walked to the end of the catwalk and up a short ladder to the deck above and proceeded straight to a wash stand a short distance away. After washing his hands he returned, in the same direction from which he had come, and headed for the ladder leading down to the catwalk. As he neared the ladder he slipped and fell, either as a result of fuel oil on the soles of his shoes that had been picked up while he worked on the catwalk where fuel oil had accumulated, or as a result of fuel oil tracked on the steel deck by his shoes when he walked toward the wash stand.

Parfait v. Jahncke Service, Inc., E.D. La. 1972, 347 F.Supp. 485, 488-89. The fall caused serious injury to Parfait's neck and back.

As outlined above, Parfait sued Jahncke on theories of negligence and unseaworthiness, Jahncke impleaded Yo-Ro as the third-party defendant, and both Yo-Ro and Jahncke impleaded Yo-Ro's insurers as fourth-party defendants. In early January of 1972, counsel for Parfait offered to settle the $160,000 suit for $90,000. Upon receiving notice of the offer, counsel for Yo-Ro wrote Jahncke, Travelers, and Home indicating that

he would regard as favorable a settlement in any amount within the $100,000 limit of Yo-Ro's general liability insurance policy with Travelers and called upon Travelers and Home to effect such a settlement immediately.[2] In reply counsel for Jahncke offered Yo-

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[2]The January 14, 1972, letter from counsel for Yo-Ro to counsel for Jahncke, for Home, and for Travelers read:

> Reference is made to a letter offer by Mr. Samuel Gainsburgh, co-counsel for the plaintiff, Wilson Parfait, wherein he indicated he would settle the pending lawsuit for the sum of $90,000.00. Obviously, this figure would be within the policy limits. Further, it would be to the best interest and advantage of the assured to have this lawsuit settled for any sum beneath the maximum amount of the general liability policy in the amount of $100,000.00.
>
> As attorney for Yoro Diesel Service, Inc., I respectfully request that the insurers settle this lawsuit to avoid exposure by Yoro of amounts in excess of the policy limit and because of the various facts and circumstances which directly affect the economic interests of Yoro. Accordingly, it is submitted that it would be to the best interest of the assured to have this lawsuit settled and I call upon you to immediately effect a settlement of the pending lawsuit, with full reservation of the attorney's fees for Yoro, and I reiterate that in the event a settlement is not consummated immediately, there is a continuing duty on your behalf to defend this matter. I re-urge your obligations under the policy and request compliance therewith, and re-assert our claim for reasonable attorney's fees.

This letter could reasonably be read as a request to Jahncke to settle for any amount under $100,000. In a letter to Yo-Ro dated January 20, 1972, counsel for Yo-Ro "explained" that the request for settlement in the January 14 letter was directed only to the insurers, and not to Jahncke. Since we cannot ascertain with confidence from the record a clear intent on Yo-Ro's part to approve the Jahncke-Parfait settlement and since the district court made no finding on this issue, we accord Yo-Ro the benefit of the doubt and treat the January 14 letter as a request for settlement directed to the insurers only. *See* note 8, *infra*.

Ro the defense of the action in exchange for a hold-harmless agreement, and indicated he would attempt to settle the case along the lines indicated by Yo-Ro if Yo-Ro did not accept the offer to take over the defense.[3] In the absence of any further objection by Yo-Ro, Jahncke settled with Parfait for a total of $74,635.84 shortly before trial of Parfait's action was to begin. At trial of the third- and fourth-party claims Yo-Ro objected to the reasonableness of the settlement, and Travelers and Home denied coverage under their respective policies.

The district court found that the oil which had dripped on to the catwalk created an unseaworthy condition which was a proximate cause of the accident, and

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[3]The full text of the January 20, 1972, letter from counsel for Jahncke to counsel for Yo-Ro read:

> I have a copy of your letter of January 14, 1972, to counsel for your clients' insurers and I note that you consider that settlement in the amount of $90,-000.00 would be desirable.
>
> As I told you over the telephone yesterday, I have been talking to Sam Gainsburgh in an attempt to work out a compromise agreement and if the opportunity presents itself in which we think that settlement can be made on an attractive basis, we will settle the principle [sic] claim and proceed against your client for indemnity.
>
> I invite you again to come in and defend Jahncke Service, Inc. in this matter and satisfy us that your client will hold it harmless and fully indemnify it for any adverse judgment in the premises. If I do not have your immediate acceptance of this offer, I will proceed with settlement along the above lines, if a reasonable opportunity presents itself to settle the case at a reasonable figure.

See note 8, *infra*.

that, even assuming substantial contributory negligence on the part of Parfait, the settlement was reasonable in amount. The court held further that Yo-Ro had breached its duty to Jahncke to perform its work in a workmanlike manner and that Jahncke was therefore entitled to indemnification from Yo-Ro for the sum it paid to satisfy its potential liability to Parfait. Finally, the district court construed the Travelers policy, but not the Home policy, as covering the indemnity expense incurred by Yo-Ro, so that the cost of the settlement ultimately fell on Travelers.

I. Indemnity

We treat first the question whether the district court properly awarded Jahncke indemnity from Yo-Ro. To establish its entitlement to indemnity for the amount paid in settlement of Parfait's claim, Jahncke was required to show first that an indemnitory-indemnitee relationship existed between Yo-Ro and itself. If there was such a relationship, Jahncke had the additional burden of satisfying the district court that it, Jahncke, had acted in accordance with equitable indemnity principles in making the settlement and had not spent its indemnitor's money too freely.

Below Jahncke relied on the breach of warranty theory set forth in *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation*, 1956, 350 U.S. 124, 76 S.Ct. 232 to establish an indemnitor-indemnitee relationship. Under the *Ryan* doctrine stevedores and other shore-based contractors who go aboard a vessel by the owner's arrangement or by his consent to perform

service for the ship's benefit impliedly warrant to the shipowner that they will accomplish their task in a workmanlike manner.[4] The essence of the contractor's warranty of workmanlike performance is to perform its work "properly and safely." *Id.* 350 U.S. at 133, 76 S.Ct. at 237. *See also Whisenant v. Brewster-Bartle Offshore Company*, 5th Cir. 1971, 446 F.2d 394, 399. The maritime contractor's warranty, just as a manufacturer's warranty against defective products, may be breached even when the contractor has not been negligent. *Italia Societa v. Oregon Stevedoring Company*, 1964, 376 U.S. 315, 84 S.Ct. 748. If the contractor breaches its warranty, and the breach proximately causes liability on the part of the shipowner, then the shipowner is entitled to indemnity unless its own conduct is "sufficient to preclude indemnity." *Weyerhaeuser Steamship Company v. Nacirema Operating Company*, 1958, 355 U.S. 563, 567, 78 S.Ct. 438, 441. To determine whether the shipowner has engaged in conduct sufficient to preclude indemnity, the conduct in question must be weighed against the contractor's breach of warranty under contract principles. *Waterman Steamship Corporation v. David*, 5th Cir. 1966, 353 F.2d 660. If the shipowner did not "prevent or seriously handicap the stevedore in his ability to do a workmanlike job," then its conduct will not preclude indemnity. *Albanese v. N. V. Nederl. Amerik Stoomv.*, 2nd Cir. 1965, 346 F.2d 481. Negligence on the ship-

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[4]We note that the *Ryan* doctrine was abrogated by the 1972 amendments to the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901, et seq. *See* 33 U.S.C.A. § 905(b). Of course, the amendments do not affect this action, which arose and was tried long before they became effective.

owner's part is not necessarily fatal to its claim for indemnity. *Weyerhaeuser Steamship Company v. Nacirema Operating Company, supra; see Italia Societa v. Oregon Stevedoring Company, supra,* 376 U.S. at 320, 84 S.Ct. at 751. In summary, "[t]he determination of whether contractual indemnity should be allowed involves a weighing process evaluating the conduct of both parties to determine (1) whether the WWLP [warranty of workmanlike performance] was breached; (2) whether that breach proximately caused the injury; and (3) whether the shipowner's conduct prevented the workmanlike performance." *Garner v. Cities Service Tankers Corp.*, 5th Cir. 1972, 456 F.2d 476, 481.

This Court has previously recognized the "equitable spirit behind the *Ryan* doctrine." *Whisenant v. Brewster-Bartle Offshore Company, supra,* at 400. Its purpose is generally to place "the burden ultimately on the company whose default caused the injury." *Italia Societa v. Oregon Stevedoring Company, supra,* 376 U.S. at 324, 84 S.Ct. at 754. The *Ryan* doctrine is not, however, a precision instrument for allocating the burden according to the relative amounts of fault, but a rough all-or-nothing device. Even where the shipowner and the contractor are both at fault, under the *Ryan* warranty doctrine indemnity will be allowed wholly or not at all, as the trier of fact may determine by weighing the conduct of the two parties as described above. See *Garner v. Cities Service Tankers Corp., supra* at 480 n. 6; G. Gilmore & C. Black, *The Law of Admiralty,* § 6-57 at 373 (1957).

In attacking the district court's conclusion that an indemnitor-indemnitee relationship existed between Yo-Ro and Jahncke under the Ryan doctrine, appellants make three arguments. First, with regard to the breach of warranty issue, eschewing any contention that fuel oil may not be an unseaworthy condition or that a maritime contractor's failure to stop work or eliminate the hazard may be a breach of the contractor's warranty of workmanlike performance,[8] they attack the district court's findings of underlying facts. Specifically, appellants argue that the record shows that no oil accumulated on the catwalk where Parfait was working, so that failure to eliminate the non-existent hazard could not have been a breach of Yo-Ro's warranty of workmanlike performance. They urge that the oil upon which Parfait slipped came from a barrel on the upper deck in which Jahncke employees were cleaning engine parts. This attack must founder on the "clearly erroneous" rule. Fed. R. Civ. P. 52(a); *MacAllister v. United States*, 1954, 348 U.S. 19, 75 S.Ct. 6. It is true that Parfait's testimony, which was the principal evidentiary source of the district court's findings, was impeached at trial by the introduction of prior inconsistent statements given at depositions and that it was inconsistent in some particulars with the testimony of other witnesses. We note, however, that at least two other witnesses' testimony tended to corroborate that the fuel oil on the upper deck was clear of Parfait's path at the time of the fall. The district court carefully considered this factual question and

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[8]Such an argument is foreclosed, as the district court observed, by Burrage v. Flota Mercante Grancolombiana, 5th Cir. 1970, 431 F.2d 1229.

specifically rejected appellants' version of the facts in favor of plaintiff's version. On the record before us we cannot say this finding was clearly erroneous. Secondly, with regard to the causation issue, appellants make a related factual argument that even if Yo-Ro breached its *Ryan* warranty by failing to clean up oil on the catwalk, this breach was not the cause of Parfait's fall, since he slipped on oil from the upper deck. Again, we cannot hold the district court's contrary finding clearly erroneous.

Thirdly, appellants advance a fundamentally misconceived argument that Jahncke can have no right of indemnity against Yo-Ro because Jahncke was actively negligent and Yo-Ro was at most passively or secondarily negligent. "Indemnity may arise either in contract or in tort." *General Electric Company v. Cuban American Nickel Company*, 5th Cir. 1968, 398 F.2d 89, 90. The two types of indemnity rights rest on separate and distinct theoretical bases and require proof and evaluation of different elements. *See, e.g., Halliburton Company v. Norton Drilling Company*, 5th Cir. 1962, 302 F.2d 431, reh. denied 1963, 313 F.2d 380, cert. denied 374 U.S. 829, 83 S.Ct. 1870; *American President Lines, Ltd. v. Marine Terminals Corporation*, 9th Cir. 1956, 234 F.2d 753, cert. denied 352 U.S. 926, 77 S.Ct. 222. As between two joint tort-feasors, the actively negligent party may recover indemnity from the passively negligent party. This type of indemnity was explored in depth in *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Company*, 5th Cir. 1969, 410 F.2d 178. *See also Magnum Marine v. Kenosha Auto Transport Corporation*, 5th Cir. 1973, ____ F.2d ____ [No. 72-3635,

July 10, 1973]. Although principles of equity underlie both this tort indemnity doctrine and the *Ryan* doctrine, indemnity under the latter does not rest on the tort concepts implicit in the former, but on a contractual warranty theory. *Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, supra* 350 U.S. at 133, 76 S.Ct. at 237. If the *Ryan* case itself left any doubt as to the distinctly contractual nature of the warranty doctrine it established, that doubt was removed in the final paragraph of *Weyerhaeuser Steamship Company v. Nacirema Operating Company, supra,* 355 U.S. at 569, 78 S.Ct. at 442, where the Court pointed out "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate." Thus, appellants' active-or-passive negligence argument is made in the wrong case; it does not touch on the pivotal issues of the *Ryan* doctrine, upon which the district court relied in determining that an indemnitor-indemnitee relationship existed in this case.

Construing appellants' active-negligence argument as a challenge to the district court's determination that the shipowner's conduct was not sufficient to preclude indemnity, we find it without merit. We agree with the district court that "any fault by Jahncke and unseaworthiness created thereby, would not have prevented Yo-Ro from performing its operations in a workmanlike manner." 347 F.Supp. at 490.

Being unpersuaded by appellants' assaults on the district court's determination that an indemnitor-indemnitee relationship existed between Yo-Ro and

Jahncke, we proceed to the second major part of appellants' attack on the district court's order of indemnity. The district court held that in order to exercise its right of indemnity against Yo-Ro for the amount of the settlement, Jahncke was required to show only potential liability, not actual liability to Parfait, and that the amount of the settlement was reasonable. And it found that Jahncke made the required showings. Appellants argue that Jahncke was required to show actual liability to Parfait and that the amount of the settlement was not reasonable.

The actual-versus-potential liability problem is unique to cases in which the original defendant (indemnitee) has settled with the original plaintiff without giving the third-party defendant (indemnitor) an opportunity to approve the amount of the settlement or to conduct the defense, and in which traditional indemnity principles are not modified by express contract between the parties. To be distinguished are "cases in which (1) the original defendant's claim for indemnification was founded on a judgment, or (2) the indemnitor was tendered the defense and refused it, or (3) the indemnitee's claim against the indemnitor was founded upon a written contract." *Whisenant v. Brewster-Bartle Offshore Company*, 5th Cir. 1971, 446 F.2d 394, 401-02; *see Tankrederiet Gefion A/S v. Hyman-Michaels Company*, 6th Cir. 1969, 406 F.2d 1039, 1042. In settlement cases such as the instant one, the indemnitee has the special problem of showing that his disposition of the indemnitor's funds has not contravened equitable indemnity principles.

Such principles require at a minimum that the indemnitee demonstrate his potential liability to the original plaintiff. *Smith v. Brown & Root Marine Operators, Inc.*, W.D. La. 1965, 243 F.Supp. 130, *aff'd per curiam sub nom. Underwater Services, Inc. v. Brown & Root Marine Operators, Inc.*, 5th Cir. 1967, 376 F.2d 852.[6] This Court has recognized that under some circumstances, when the original claim has been settled, a showing of actual liability may be required to support the indemnity claim. *Whisenant v. Brewster-Bartle Offshore Company, supra* at 401-03. We have approved the view of the Fourth Circuit expressed in *Jennings v. United States*, 4th Cir. 1967, 374 F.2d 983, 986 that:

> The indemnitee's unilateral acts, albeit reasonable and undertaken in good faith, cannot bind the indemnitor; notice and an opportunity to defend are the indispensable due process satisfying elements.

See *Whisenant v. Brewster-Bartle Offshore Company, supra* at 403. This Circuit has not, however, unreservedly adopted the "general rule" of the Sixth Circuit "that an indemnitee must show actual liability to recover against an indemnitor." *Tankrederiet Gefion A/S v. Hyman-Michaels Company*, 6th Cir. 1969, 406 F.2d 1039, 1042.

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[6] *See also* Jennings v. United States, 4th Cir. 1967, 374 F.2d 983; American Export Lines v. Norfolk Shipping & Drydock Corporation, 4th Cir. 1964, 336 F.2d 525; Damanti v. A/S Inger, 2d Cir. 1963, 314 F.2d 395, 397, cert. denied sub nom. Daniels & Kennedy, Inc. v. A/S Inger, 375 U.S. 834, 84 S.Ct. 46; Paliaga v. Luckenbach Steamship Company, 2d Cir. 1962, 301 F.2d 433; California Stevedore & Ballast Company v. Pan-Atlantic Steamship Corporation, 9th Cir. 1961, 291 F.2d 252.

In this case we do not find any circumstances present which, in fairness to the indemnitor, call for proof of actual liability.[7] A practical device by which an indemnitee can protect himself against the awkward possibility of having to prove the original plaintiff's case against himself, the original defendant, is to offer the indemnitor before any settlement is concluded the choice of (1) approving the settlement or (2) taking over the defense of the case and agreeing to hold the indemnitee harmless in any event for damages which may be assessed against him in excess of the amount of the proposed settlement. See *Tankrederiet Gefion A/S v. Hyman-Michaels Company, supra* at 1043-44. If the indemnitor approves the settlement or defends unsuccessfully against the original claim, he cannot later question the indemnitee's liability to the original claimant. If the indemnitor declines to take either course, then the indemnitee will only be required to show potential liability to the original plaintiff in order to support his claim over against the indemnitor. Al-

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[7]The district court determined only that Jahncke demonstrated its potential liability to Parfait, but the court's finding that the accumulated oil on the catwalk beside the engine constituted an unseaworthy condition which was a proximate cause of the accident closely approaches a determination that Jahncke's actual liability was established. Because the district court did not rule in the first instant on Parfait's status as a *Sieracki* seaman or on the extent of his contributory negligence, if any, however, we do not treat the district court's finding of unseaworthiness which proximately caused the accident as a conclusive finding of factual liability. *See* Jackson v. Lykes Brothers Steamship Company, 1967, 386 U.S. 731, 734, 87 S.Ct. 1419, 1421 n.4; Seas Shipping Company v. Sieracki, 1946, 328 U.S. 85, 94, 66 S.Ct. 872, 877 n.11; Whisenant v. Brewster-Bartle Offshore Company, 5th Cir. 1971, 446 F.2d 394, 403 n.31.

though the record in this case does not conclusively show that Jahncke formally made to Yo-Ro the type of pre-settlement offer[8] described in *Tankrederiet Gefion A/S v. Hyman-Michaels Company, supra,* it does show that Yo-Ro was afforded substantially the same protection as if the *Tankrederiet Gefion* procedure had been followed. Yo-Ro was continuously informed of the settlement negotiations in progress and was offered and declined defense of the original action. The only variation from the *Tankrederiet Gefion* procedure was the apparent failure of Jahncke to tender the final settlement offer to Yo-Ro for approval. In view of Yo-Ro's awareness of the progress of the negotiations and its failure to object to settlement on the terms contemplated, we do not view this omission as serious in the circumstances of this case. Yo-Ro had a clear opportunity to challenge the Jahncke-Parfait liability to protect its own interest as an indemnitor, yet it declined to do so. Under the circumstances, we conclude that only a showing of potential liability was necessary. The finding of potential liability is strongly supported by the record.

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[8]The letter quoted in note 3, *supra,* appears to be such a pre-settlement offer, but it may not have arrived before the settlement was concluded. The letter is dated January 20, 1972, a maximum of three days before the settlement, which was concluded at an undisclosed time before trial began on Monday, January 24, 1972.

But for the January 20, 1972 letter from Yo-Ro to Jahncke (whose arrival time in relation to the time of the settlement is also unknown to us) which "explained" the earlier January 14 letter from Yo-Ro to Jahncke, *see* note 2, *supra,* we would construe the January 14 letter as an effective approval of any settlement under $100,000 that Jahncke might make with Parfait, estopping Yo-Ro from questioning the Jahncke-Parfait liability and rendering a formal *Tankrederiet Gefion* offer unnecessary.

The *Whisenant* case, in which a showing of actual liability was required, is distinguishable. There the original negligence theory on which the original plaintiff had proceeded appeared questionable as a basis for liability, and the indemnitee had attempted to justify the settlement by amending its pleadings to introduce a new unseaworthiness theory. Further, the indemnitor in that case had no real opportunity to contest the original claim, and the record indicated that, given the chance, he would have chosen to do so. None of these circumstances, nor any others suggesting unfairness to the indemnitor, are present in the instant case.

In addition to potential liability, Jahncke had the burden of showing that the settlement was reasonable in amount. Appellants urge that the amount of the settlement was excessive because if the claim had been tried, contributory negligence of the plaintiff would have diminished the amount of his recovery by a fraction approaching one hundred percent. We cannot say, however, that the contrary finding of the district court was clearly erroneous.

Thus, we conclude that the district court properly held an indemnitor-indemnitee relationship existed between Yo-Ro and Jahncke by virtue of the *Ryan* doctrine and that Jahncke, having shown potential liability and the reasonableness of the amount of its settlement with Parfait, was entitled to indemnification from Yo-Ro.

II. Coverage Under the Policy of Travelers Indemnity Company

It was stipulated at trial that Yo-Ro offered its insurers an opportunity to defend in accordance with its contractual obligations and that each insurer denied coverage. Whether the insurance companies must pay Yo-Ro's damages depends wholly on whether the loss is covered under their respective policies.

The pertinent insuring language in the Travelers $100,000 "Commercial Automobile — General Liability Policy" reads:

> The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of
>
> Coverage A. *Bodily injury.*
>
> Coverage B. *Property damage.*
>
> to which this insurance applies .... [emphasis in original.]

As defined in the policy, "bodily injury" means "bodily injury, sickness or disease sustained by any person," and "property damage" means "injury to or destruction of tangible property." Travelers contends that two exclusionary paragraphs preclude coverage for Yo-Ro's loss. The first is exclusion (d), also called the "watercraft exclusion." We do not deal with this

exclusion, since we agree with Travelers that the second one, exclusion (h), makes plain that the policy does not cover the type of loss involved in this case.

The exclusionary provision reads:

> This insurance does not apply to:
>
> (h) *bodily injury* to any employee of the *insured* arising out of and in the course of the employment by the insured; but this exclusion does not apply to liability assumed by the *insured* under an *incidental contract*. [emphasis in original.]

The parties agree that Parfait was Yo-Ro's employee, that he was injured in the course of his employment, and that no "incidental contract," as that term is defined in the policy, existed between Yo-Ro and Jahncke. Thus, the exclusion would appear to defeat coverage in this case. Yo-Ro's argument in favor of coverage is that the exclusion applies only to liability resulting from an action by the injured employee directly against the employer, and not to an obligation to indemnify a third party which has been found primarily liable to compensate an injured employee of the insured.

We agree with Yo-Ro that the insuring language in the policy, which speaks broadly of "all sums" which the insured shall become obligated to pay as damages "because of" bodily injury, is broad enough to cover both (1) liability directly to an injury victim and (2)

liability to indemnify a third party which is based ultimately on bodily injury, but we cannot agree that exclusion (h) applies only to the former type of liability. The insuring language covers only liability — whether direct or indirect via indemnity under the *Ryan* doctrine — for bodily injury "to which this insurance applies." Exclusion (h) provides expressly that the insurance does not apply to injury to the insured's employees in the course of their employment. The employee status of the injury victim is made the key to the exclusion, not the procedural route by which the liability comes to rest on the insured. Bodily injury coverage of the policy extends only to non-employees. We do not find such an exclusion anomalous in Travelers' "Commercial Automobile — General Liability Policy," for employee injuries have long been treated as a special kind of risk and covered under special policies.

Exclusion (a) is not inconsistent with exclusion (h) and does not change our conclusion. Under exclusion (a) the insurance does not apply:

> (a) to liability assumed by the *insured* under any contract or agreement except an *incidental contract;* but with respect to *bodily injury* or *property damage* occurring while work performed by the *named insured* is in progress, this exclusion does not apply to a warranty that such work will be done in a workmanlike manner. [emphasis in original.]

In exempting from its sweep warranty liability under the *Ryan* doctrine, exclusion (a) is consistent with our broad reading of the insuring language. Exclusion (a) is limited by exclusion (h), but the two are not inconsistent, since liability arising from injury to a non-employee might be imposed under the *Ryan* doctrine.*

Indemnity Insurance Company v. California Stevedore & Ballast Company, 9th Cir. 1962, 307 F.2d 513, upon which Yo-Ro relies, is not apposite, since the policy language in that case was significantly different from the language in question in this case. The applicability of *Larson Construction Company v. Oregon Automobile Insurance Company*, 9th Cir. 1971, 450 F.2d 1195, is doubtful because only brief fragments of the insuring and exclusionary language are quoted in that opinion.

We are, of course, aware of the rule that ambiguities in an insurance policy must be construed against the insurer, but we can discover no ambiguities or incon-

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*After explaining the contractual nature of the *Ryan* warranty of workmanlike performance, under which the shipowner may recover from the stevedore the amount of damages the shipowner has paid on acount of injuries to the stevedore's employee, the Supreme Court explained:

> And a like liability for breach of contract accrues to a shipowner against a stevedoring contractor in any instance when the latter's improper storage of cargo causes an injury on shipboard to someone other than one of its employees. The coincidence that the loading contractor here happens to be the employer of the injured longshoreman makes no difference in principle.

Ryan Stevedoring Company v. Pan-Atlantic Steamship Corporation, 1956, 350 U.S. 124, 130-31, 76 S.Ct. 232, 236.

sistencies in the Travelers policy as applied to the facts of this case. The plain language of the policy shows that it does not cover liability originating in injuries to the insured's employees. Accordingly, we must reverse that portion of the district court's judgment holding that the Travelers policy covered Yo-Ro's obligation to indemnify Jahncke.

III. Coverage Under the Policy of Home Indemnity Company

In its "Standard Workmen's Compensation and Employers' Liability Policy" Home agreed:

> 1. Coverage A — Workmen's Compensation: To pay promptly when due all compensation and other benefits required of the insured by the workmen's compensation law.
>
> 2. Coverage B — Employers' Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom, sustained ... by any employee of the insured arising out of and in the course of his employment by the insured ....

The policy limit of liability is $25,000. As was true of the Travelers policy, the insuring language in the Home policy is broad enough to cover both direct liability to the injury victim and indirect liability under

the *Ryan* doctrine on account of bodily injury. This breadth of coverage is made explicit in condition 9 of the policy:

> The words "damages because of bodily injury by accident or disease, including death at any time resulting therefrom," in coverage B include damages for care and loss of services and damages for which the insured is liable by reason of suits or claims brought against the insured by others to recover the damages obtained from such others because of such bodily injury sustained by employees of the insured arising out of and in the course of their employment.

Consistently, exclusion (c), relating to liability assumed by the insured under a contract, expressly exempts from its scope liability to indemnify under the *Ryan* doctrine. Unlike the Travelers policy, the Home policy is aimed specifically at liability resulting from employees' injuries.

In denying coverage, Home relies on the "Exclusion of Maritime Liability Endorsement," which reads:

> It is agreed that the policy does not apply to injury, including death resulting therefrom, sustained by a master or a member of the crew of any vessel or by any person in the course of an employment subject to the United States Longshoremen's and Harbor Workers' Com-

pensation Act, U.S. Code (1946) Title 33, Sections 901-49.

Home argues that this exclusion excludes both direct liability to employees covered by the Longshoremen's and Harbor Workers' Act and *Ryan* warranty liability originating in injuries to such employees.

As we read the maritime exclusion, however, it is somewhat narrower than the insuring language and may be read as excluding only direct liability to an employee covered by the Longshoremen's and Harbor Workers' Act. The words "the policy does not apply to injury" are ambiguous as applied to liability under the *Ryan* doctrine, which arises not directly from the injury, but from breach of a warranty obligation. The exclusion may reasonably be read as only a counterpart of Coverage A, providing Workmen's Compensation coverage — as an exclusion of coverage for liability directly to the employees for maritime injuries, either under the Act or apart from it — and not as an exclusion of *Ryan* indemnity liability. We conclude that, in view of the clear thrust of those portions of the policy providing coverage both for direct liability to employees and for indemnity liability originating from employees' injuries and in view of the uncertain application of the maritime exclusion to indemnity liability, the policy must be construed as providing coverage for indemnity liability originating from an employee's maritime injuries. If an exclusion is to take away what the insuring language provides, it must do so in unmistakably clear terms. Accordingly, we hold

the Home policy does cover Yo-Ro's liability to Jahncke within its liability limits.

The judgment of the district court is AFFIRMED in part and REVERSED in part. Costs are taxed equally against Yo-Ro and Home.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 72

No. 72-3316

D. C. Docket No. CA 69-225 "I"

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,

Defendant-Third Party Plaintiff-Appellee,

YO-RO DIESEL SERVICE, INC.,

Third Party Defendant-Fourth Party Plaintiff-Appellee-Appellant,

HOME INDEMNITY COMPANY,

Third Party Defendant-Appellee,

THE TRAVELERS INDEMNITY COMPANY,

Fourth Party Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

It is further ordered that costs on appeal are to be taxed equally against Yo-Ro Diesel Service, Inc. and Home Indemnity Company.

August 31, 1973

Issued as Mandate:

66

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
OCT 3 1973
EDWARD W. WADSWORTH
CLERK

No. 72-3316

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,
Defendant-Third Party
Plaintiff-Appellee,

YO-RO DIESEL SERVICE, INC.,
Third Party Defendant-
Fourth Party Plaintiff-
Appellee-Appellant,

HOME INDEMNITY COMPANY,
Third Party Defendant-Appellee,

THE TRAVELERS INDEMNITY COMPANY,
Fourth Party Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING

(OCTOBER 3 , 1973)

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Home Indemnity Company, Appellee in the above entitled and numbered cause be and the same is hereby Denied

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3316

WILSON J. PARFAIT,

Plaintiff,

versus

JAHNCKE SERVICE, INC.,

Defendant-Third Party
Plaintiff-Appellee,

YO-RO DIESEL SERVICE, INC.,

Third Party Defendant-
Fourth Party Plaintiff-
Appellee-Appellant,

HOME INDEMNITY COMPANY,

Third Party Defendant-
Appellee,

THE TRAVELERS INDEMNITY COMPANY,

Fourth Party Defendant-
Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
(Opinion Aug. 31, 1973, 5 Cir., 1973, ____ F.2d ____).

(October 24, 1973)

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

PER CURIAM: In its petition for rehearing, Yo-Ro Diesel Service, Inc. raises four points. The first three concern the reasonableness of its opportunity to defend, the fact finding that there was oil on the catwalk, and the construction of the exclusionary clause in the Travelers insurance policy. We think our original opinion adequately disposes of these issues.

Point four of the petition, however, raises the issue of costs of the defense, including attorney's fees. The district court had awarded these costs against Travelers and allowed the parties sixty days from the date of the judgment to agree on their amount. In the absence of an agreement, any party was invited to apply to that court for a hearing to determine the amount. We have reversed as to the liability of Travelers and as to the nonliability of Home, but we have not dealt with the issue of the costs as a matter of contractual liability under the policies.

Both the Home and the Travelers policies contain clauses obligating the insurers to bear the costs of defense to suits on claims covered by the policies. It is probable that both insurers are therefore liable for

the costs of this suit, including attorney's fees, even though only Home has been held liable for the basic claim, since there was a reasonable possibility that each policy might have covered this claim. See J. Appleman, Insurance Law and Practice, § 4683 (1962). Although this issue has been raised by Yo-Ro in its brief, neither Home nor Travelers has argued it. We could, of course, grant the petition for rehearing on this point, hear further argument on it, and remand to the district court for a determination of the amount of any defense costs we determined might be allowable. In the interests of judicial economy, however, we feel that the most expeditious way to handle this whole issue is to remand to the district court for a hearing on both the existence of liability for costs on the part of either Home or Travelers or both and the amount of those costs.

The petition for rehearing is DENIED and the case is REMANDED for a hearing on these issues.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.